

**PROFESSIONAL SERVICES AGREEMENT BETWEEN
SANTA FE COUNTY AND
TBA
FOR LEGAL AND PLANNING SERVICES TO DEVELOP AMENDMENTS TO
SANTA FE COUNTY'S SUSTAINABLE GROWTH MANAGEMENT PLAN AND
SUSTAINABLE LAND DEVELOPMENT CODE**

This Professional Services Agreement (this "Agreement") is made and entered into on this _____ day of _____, 2014 between TBA, whose principal place of business is located at _____, hereinafter referred to as the "Contractor".

RECITALS

WHEREAS, Santa Fe County Growth Management Department, Planning Division, desires to contract with a team of legal and planning professional to develop amendments to the County's Sustainable Growth Management Plan (SGMP) and Sustainable Land Development Code (SLDC); and

WHEREAS, the SGMP and the SLDC consider certain land uses will be regulated as Developments of Countywide Impact (DCIs) as indicated in RFP #2015-0154-GM/BT; and

WHEREAS, Santa Fe County will amend the SGMP and if applicable the SLDC based on the planning and development of DCI regulations; and

WHEREAS, the County will develop amendments to the SLDC for bonus and incentive zoning for planned development districts and cluster or conservation subdivisions and as necessary, amendments to the SGMP; and

WHEREAS, the County's SGMP and the SLDC contain Transfer of Development Rights (TDR) provisions that require amendments to further define the TDR program to establish a mechanism for all property owners to transfer development rights; and

WHEREAS, the County requires the services of the Contractor, and Contractor is qualified and willing to provide these services and both parties wish to enter into this Agreement.

NOW, THEREFORE, THE PARTIES AGREE AS FOLLOWS

1. SCOPE OF WORK

The Contractor shall provide planning and legal services as requested in support of the County's efforts to amend SGMP and SLDC. Planning and legal services shall be provided for the areas of Developments of Countywide Impact

regulations, Bonus and Incentive Zoning initiative, and the Transfer of Development Rights Program as detailed hereto as Exhibit “A”.

The County may also request the Contractor to provide planning and legal services with respect to other elements of the SGMP or sections of the SLDC.

With respect to each topic, the Contractor will be required to appear before the BCC to explain draft documents and answer questions. In addition, each topic may require the Contractor to develop and implement a public planning process, as determined by the County. Services required by this contract may also include review of documents, including drafts of proposed amendments, attending informal or public meetings, providing written and oral advice, conducting legal research if requested by the County, and drafting or assisting in the drafting of select SGMP and SLDC provisions. Legal services shall include, but not be limited to, opining on the legality and enforceability of proposed SLDC amendments.

A. Developments of Countywide Impact

The Contractor shall thoroughly review the County’s Oil and Gas Element and Ordinance No. 2008-19 to evaluate and help the County determine which aspects of those documents will be made applicable to all DCI regulations. Based upon that review, the Contractor shall develop and implement one or more public planning processes for the development of DCI regulations for inclusion in the SLDC and, if required DCI elements for inclusion in the SGMP.

In recognition of the fact that some aspects of Ordinance No. 2008-19 will be applicable to all DCIs and that the Oil and Gas element and Ordinance 2008-19 were the product of an extensive public planning process, the Contractor shall prioritize the drafting of DCI provisions that are applicable to all DCIs as well as oil and gas specific provisions for inclusion in the SLDC, such provisions to be based upon Ordinance No. 2008-19. In addition, the Contractor shall prioritize the development of DCI regulations for inclusion in the SLDC and DCI elements for inclusion in the SGMP for those DCIs that are subject of the moratorium.

Legal services with respect to DCIs shall include, but not be limited to, the development of a legal framework to guide the development of legally defensible and scientifically based DCI regulations.

B. Bonus and Incentive Zoning

The Contractor shall develop amendments to SLDC for bonus and incentive zoning for planned development districts and cluster or conservation subdivisions and, if necessary, amendments to the SGMP. Bonus incentives may include increased densities for renewable energy, affordable housing, clustering, design and sustainability features. This may include a public planning process before public hearings and meetings with the BCC.

C. TDR Program

The Contractor shall develop amendments to the SLDC and, if necessary, the SGMP to fully develop the TDR Program. The TDR Program will establish a mechanism to all a property owner to transfer development rights from sending property to receiving property in zoning districts authorized to receive TDRs or to a County Land Bank.

2. COMPENSATION, INVOICING, AND SET-OFF

- A. The total amount payable to the Contractor under this Agreement shall not exceed _____ Dollars (\$____.00) exclusive of gross receipts tax (GRT), if applicable. Any New Mexico GRT levied on the amounts payable under this Agreement shall be paid by the County to the Contractor. Compensation shall be paid as follows:
- B. Payment shall be made upon receipt of a detailed, certified billing invoice and acceptance of the deliverable by the County. Thirty (30) days shall be allowed for payment after receipt of the invoice and acceptance of the services and deliverables.
- C. Payment under this agreement shall not foreclose the right of the County to recover excessive or illegal payment.

3. TERM AND TERMINATION

This Agreement shall upon due execution by all parties become effective as of the date first written above and shall terminate one (1) year later unless earlier terminated pursuant to this Section or Section 4 of this Agreement.

The period of the agreement may be extended by the mutual written agreement of both Parties. This Agreement may be terminated by either of the Parties hereto upon written notice delivered to the County party not less than thirty (30) days prior to intended date of termination, provided, however, that Contractor may terminate this Agreement upon five (5) days notice if any payment due from County is not received before or upon the date due. In the event County terminates this Agreement without cause or for any reason, Contractor shall be permitted to complete any deliverables then in process and County shall pay Contractor for all costs incurred through the date of termination, including all non-cancelable obligations, even though the obligations may extend beyond the termination date. Termination will not affect the Parties' rights and obligations accrued prior to termination.

4. APPROPRIATIONS AND AUTHORIZATIONS

This Agreement is contingent upon sufficient appropriations and authorizations being made for performance of this Agreement by the Board of County

Commissioners of Santa Fe County and/or, if state funds are involved, the Legislature of the State of New Mexico. If sufficient appropriations and authorizations are not made in this or future fiscal years, this Agreement shall terminate upon written notice by the County to Contractor. Such termination shall be without penalty to the County, and the County shall have no duty to reimburse Contractor for expenditures made in the performance of this Agreement. The County is expressly not committed to expenditure of any funds until such time as they are programmed, budgeted, encumbered and approved for expenditure by the County. The County's decision as to whether sufficient appropriations and authorizations have been made for the fulfillment of this Agreement shall be final and not subject to challenge by Contractor in any way or forum, including a lawsuit.

5. LIABILITY

- A. As between the Parties, each Party will be responsible for claims of damages arising from personal injury damage to persons or tangible property to the extent they result from negligence of its employees, subject in all cases to the immunities and limitations of the New Mexico Tort Claims Act, NMSA 1978, § 41-4-1 et seq. as amended.
- B. In the event of breach of this Agreement by Contractor, the County's sole and exclusive remedy will be the right to terminate this Agreement in whole or in part, and to recover amounts paid by the County under this Agreement that are equitably related to the breach.

6. PROPRIETARY AND CONFIDENTIAL INFORMATION

If the need to exchange proprietary or confidential information should arise during Contractor's performance under this Agreement, the Parties shall take necessary steps to protect disclosure of such information such as executing a Non-Disclosure Agreement.

7. INTELLECTUAL PROPERTY AND RIGHTS IN MATERIALS

- A. Contractor is the owner or licensee of any processes, know-how, technologies or templates used in producing and completing the deliverables and providing the services hereunder, or any derivatives thereto, during the term of this Agreement. The County shall not have any claims to or rights in such materials, processes, information or technologies owned by or licensed to Contractor.
- B. The County will retain ownership of all Confidential Information provided to Contractor under this Agreement, and will retain ownership of all reports and deliverables generated under this Agreement in either hard copy or electronic form, provided, however that Contractor will retain the right to use, publish and disseminate such reports in furtherance of Contractor's educational and research

mission. Any such use by Contractor will include acknowledgment of the source of data and/or ownership of the report.

- C. Nothing in this Agreement grants to either Party any rights or interest in the other Party's Background Intellectual Property. "Background Intellectual Property" means: (a) all works of authorship created outside the scope of this Agreement; and, (b) potentially patentable discoveries, including pending patent applications and issued patents, conceived or first reduced to practice outside the scope of this Agreement.
- D. Neither Party will use the names, trademarks or logos of the other Party in any form of advertising or publicity without prior express written authorization from the other Party. Contractor may publish in its institutional publications the aggregate amount of the funding to be received under this Agreement listing only County's name and the nature of the activity funded.

8. CONFIDENTIAL INFORMATION

"Confidential Information" means any non-public materials or information of the County which are provided to Contractor for performance of the services and deliverables; and, any non-public information of County which is disclosed to Contractor in writing and clearly marked "Confidential" or "Proprietary", or if disclosed orally and identified as confidential at the time, is thereafter reduced to writing by County, clearly marked "Confidential" or "Proprietary" and transmitted to Contractor within thirty (30) days after oral disclosure. The following shall not be considered Confidential Information: any material or information which: (a) was in Contractor's possession on a non-confidential basis prior to receipt from County; (b) is in the public domain or is general or public knowledge prior to disclosure, or after disclosure, enters the public domain or becomes general or public knowledge through no fault of Contractor; (c) is properly obtained by Contractor from a third party not under a confidentiality obligation to County; (d) is explicitly approved for release by written authorization of County; (e) is or has been developed by Contractor independent of Contractor's access to County's Confidential Information; or (f) is required by law or court order to be disclosed.

9. NON-DISCLOSURE AND NON-USE

For a period of three (3) years from the date Contractor is given access to Confidential Information, Contractor will not disclose or use Confidential Information for any purpose except as is expressly authorized by the Agreement. Contractor may disclose Confidential Information to its own employees on a need-to-know basis, provided, however, that such employees are advised of the confidentiality and non-use obligations. In no event will Contractor disclose Confidential Information to third parties unless it obtains the prior written consent of County.

10. RESPONSE TO INFORMATION REQUESTS

If Contractor receives a request under the New Mexico Inspection of Public Records Act, Section 14-2-1 et seq., NMSA 1978 as amended, or a request by other legal process to disclose Confidential Information, Contractor will use reasonable efforts to provide prompt notice to County and will reasonably cooperate with County to protect any Confidential Information.

11. PUBLICATION, REPRODUCTION, AND USE OF MATERIAL; COPYRIGHT

- A. The County has the unrestricted right to publish, disclose, distribute and otherwise use, in whole or in part, the reports and deliverables prepared under or pursuant to this Agreement.

12. MODIFICATIONS

No changes, amendments or alterations to this Agreement will be effective unless such changes, amendment or modification is in writing and signed by the Parties.

13. COUNTERPARTS

This Agreement may be executed in any number of counterparts, each of which will be deemed an original, but all of which constitute one and the same instrument. Facsimile or PDF signatures shall constitute original signatures for all purposes.

14. NOTICES

Any notice given under this Agreement will be in writing and will be effective upon receipt evidenced by: (a) personal delivery; (b) confirmed facsimile transmission; (c) return receipt of postage prepaid registered or certified mail; or (d) delivery confirmation by commercial overnight carrier. All communications will be sent to the addresses set forth below or to such other address designated by a Party by written notice to the other Party:

To Contractor:

To County:

Santa Fe County Attorney
102 Grant Avenue
Santa Fe, New Mexico 87501

15. WAIVER OF BREACH

No waiver of any right, remedy, power or privilege by any Party under this Agreement shall be effective unless made in writing. No waiver of any breach of any provision of this Agreement shall constitute a waiver of any subsequent breach of the same or of any other provision of this Agreement.

16. ASSIGNMENT

This Agreement shall bind, and inure to the benefit of, the Parties and any successors. Neither Party may assign this Agreement without first obtaining the prior written consent of the other Party.

17. THIRD PARTIES

Nothing in this Agreement, express or implied, is intended to confer any rights, rights of enforcement, remedies, claims or interests upon a person not a party to this Agreement.

18. SUBCONTRACTING

Contractor may find it necessary to subcontract a portion of the services described in this Agreement and will obtain the written approval of the County prior to the services being performed. No such subcontracting shall relieve Contractor from its obligations and liabilities under this Agreement. Contractor must not disclose confidential information of County to a subcontractor unless and until such subcontractor has agreed in writing to protect the confidentiality in the manner required of Contractor under this Agreement.

19. RELATIONSHIP OF THE PARTIES

Contractor and its agents and employees are independent contractors and are not employees or agents of the County. NM and its employees will not be considered employees of County for any purpose, including, but not limited to, workers' compensation, insurance, bonding or any other benefits afforded to employees of County. Neither Party has any express or implied authority to assume or create any obligation or responsibility on behalf of or in the name of the other Party.

20. CONFIDENTIALITY

Any confidential information provided to or developed by the Contractor in the performance of this Agreement shall be kept confidential and shall not be made available to any individual or organization by Contractor without the prior written approval of the County.

21. MERGER

This Agreement embodies the entire understanding of the Parties and will supersede all previous or contemporaneous communications, either verbal or written, between the Parties relating to the subject matter hereof. All terms and conditions of any instruments, including terms and conditions appearing on purchase orders issued by County to facilitate payment under this Agreement, are inapplicable to this Agreement, even though they may be issued after the signing of this Agreement.

22. SEVERABILITY

If a court of competent jurisdiction finds any provision of this Agreement legally invalid or unenforceable, such finding will not affect the validity or enforceability of any other provision of this Agreement and the Parties will continue to perform. If the Agreement cannot be performed in the absence of the provision, this Agreement will terminate upon thirty (30) days written notice by one Party to the other Party.

23. PRECEDENCE

In the event any inconsistencies arise between the terms of this Agreement and the terms of any schedules, task orders, exhibits, attachments or other documents attached hereto, the terms contained in the body of this Agreement shall prevail. Any additional terms or conditions proposed in a subsequent schedule, exhibit, task order, attachment or other document will not become a part of this Agreement unless accepted in writing by the authorized representatives of the Parties. No purchase order, invoice, or any pre-printed terms on the County's purchase order for or invoice will modify the terms of this Agreement.

24. FORCE MAJEURE

Each Party will be excused from performance of the Agreement only to the extent that performance is prevented by conditions beyond the reasonable control of the affected Party. The Party claiming excuse for delayed performance will promptly notify the other Party and will resume its performance as soon as performance is possible.

25. NO THIRD-PARTY BENEFICIARIES

This Agreement was not intended to and does not create any rights in any persons not a party hereto.

26. INSURANCE

Contractor represents and certifies that it maintains professional and general liability coverage as provided by the New Mexico Risk Management Division in accordance with the New Mexico Tort Claims Act, Section 41-4-1 et seq., NMSA 1978, as amended.

27. RECORDS AND INSPECTIONS

- A. To the extent its books and records relate to (i) its performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to the County as part of the procurement process, Contractor agrees to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under this Agreement; (ii) allow the County or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance guidelines under related OMB Circulars.
- B. To the extent its books and records relate to (i) its performance of this Agreement or any subcontract entered into pursuant to it or (ii) cost or pricing data (if any) set forth in this Agreement or that was required to be submitted to County as part of the procurement process, Contractor also agrees to require any subcontractor it may hire to perform its obligations under this Agreement to (i) maintain such books and records during the term of this Agreement and for a period of six (6) years from the date of final payment under the subcontract; (ii) to allow the County or its designee to audit such books and records at reasonable times and upon reasonable notice; and (iii) to keep such books and records in accordance with guidelines under related OMB Circulars.

28. COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW

- A. This Agreement shall be construed in accordance with the substantive laws of the State of New Mexico, without regard to its choice of law rules. Contractor and the County agree that the exclusive forum for any litigation between them arising out of or related to this Agreement shall be the state district court of New Mexico, located in Santa Fe County.
- B. In performing its obligations hereunder, the Contractor shall comply with all applicable laws, ordinances, and regulations.
- C. Contractor shall comply with the requirements of Santa Fe County Ordinance No. 2014-1 (Establishing a Living Wage).

29. NEW MEXICO TORT CLAIMS ACT

No provision of this Agreement modifies or waives any sovereign immunity or limitation of liability enjoyed by County or its “public employees” at common law or under the New Mexico Tort Claims Act, NMSA 1978, Section 41-4-1, et seq.

30. HEADINGS

Headings and captions used in this Agreement are for convenience and ease of reference only and will not be used to construe, interpret, expand or limit the terms, conditions or provisions of this Agreement.

31. ENTIRE AGREEMENT

This Agreement represents the entire understanding between the Parties and supersedes any prior agreements or understanding with respect to the subject matter of this Agreement.

32. CAMPAIGN CONTRIBUTION DISCLOSURE FORM

The Contractor agrees to compute and submit simultaneous with execution of this Agreement a Campaign Contribution Disclosure Form approved by the County.

33. SURVIVAL

The provisions of the following paragraphs shall survive termination of this Agreement: RECORDS AND INSPECTION; CONFIDENTIALITY; PUBLICATION, REPRODUCTION, AND USE OF MATERIAL; COPYRIGHT; COMPLIANCE WITH APPLICABLE LAW; CHOICE OF LAW; NO THIRD-PARTY BENEFICIARIES; SURVIVAL.

IN WITNESS WHEREOF, the parties have duly executed this Agreement as of the date first written above.

SANTA FE COUNTY

By: _____
Printed Name: Katherine Miller
Title: County Manager

Dated: _____

APPROVED AS TO FORM:

By: _____
Printed Name: Gregory S. Shaffer
Title: Santa Fe County Attorney

Dated: _____

FINANCE DEPARTMENT:

By: _____
Printed Name: Teresa C. Martinez
Title: Finance Director

Dated: _____

CONTRACTOR

By: _____
Printed Name:
Title:

Dated: _____